

**EXHIBIT A**

1 Dennis F. Dunne (admitted *pro hac vice*)  
2 Samuel A. Khalil (admitted *pro hac vice*)  
3 MILBANK LLP  
4 55 Hudson Yards  
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8  
9 *and*

10 Gregory A. Bray (SBN 115367)  
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14 Los Angeles, CA 90067  
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17 *Counsel for the Official Committee  
18 of Unsecured Creditors*

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1                   The Official Committee of Unsecured Creditors appointed in the above-captioned cases  
2 (the “Creditors’ Committee”) hereby submits this supplemental brief in response to the *Plan*  
3 *Proponents’ Joint Memorandum of Law and Omnibus Response in Support of Confirmation of*  
4 *Debtors’ and Shareholder Proponents’ Joint Chapter 11 Plan of Reorganization* [Docket No.  
5 7528] (the “Debtors’ Reply”), and respectfully states as follows:

6                   **PRELIMINARY STATEMENT**

7                   1.       On reply, the Debtors advance an argument for the first time: that all contingent  
8 claims for indemnification and contribution—except those belonging to the Debtors’ own  
9 directors, officers, and employees—are to be disallowed summarily, without further order from  
10 the Court, by operation of section 502(e)(1)(B) of the Bankruptcy Code. If this is indeed how the  
11 Plan<sup>1</sup> works, it is not presently confirmable under section 1129(a)(1) because it would strip  
12 ***purportedly unimpaired creditors*** of their legal rights while depriving them of the ability to vote  
13 on the Plan.

14                  2.       In this supplemental brief, the Creditors’ Committee raises three points to assist the  
15 Court in evaluating the parties’ positions on this issue.

16                  3.       First, the Debtors are attempting to exercise their assumption powers in an  
17 impermissible manner. Namely, the Debtors purport to use the act of ***assumption*** as a vehicle to  
18 automatically invalidate otherwise valid and enforceable provisions of an assumed contract  
19 regardless of whether the applicable claimant preserved its right to pursue claims thereunder. At  
20 the same time, the Debtors seek to vindicate (and even insulate from challenge) identical  
21 contractual provisions that inure to the benefit of the Debtors’ own directors and officers.

22                  4.       Second, the concerns expressed by Congress when it enacted section 502(e)(1)(B)  
23 are not implicated here. Section 502(e)(1)(B) is designed to prevent duplicative claims against an  
24 insolvent estate. But the contingent claims for indemnification at issue here are not duplicative:

25  
26  
27                  1       See *Debtors’ and Shareholder Proponents’ Joint Chapter 11 Plan of Reorganization Dated May 22, 2020* [Docket  
28 No. 7521] (as it may be amended, modified or supplemented from time to time, and together with any exhibits or  
schedules thereto, the “Plan”). Capitalized terms not defined herein have the meanings ascribed to them in the  
Plan.

1 the Debtors' liability to the Fire Victims, which is being settled under the Plan,<sup>2</sup> is distinct from  
2 liability a Vendor<sup>3</sup> might have to the Fire Victims. And these are solvent estates.

3 5. *Finally*, the Debtors ignore the operation of section 502(e)(2). That section  
4 provides that, while certain contingent claims may be subject to disallowance (through the claims  
5 reconciliation process), they "**shall be determined, and shall be allowed**" once they become  
6 fixed—*i.e.* once payments, for which the Debtors may be liable, are made to third parties. 11  
7 U.S.C. § 502(e)(2) (emphasis added). The Debtors' attempt to permanently disallow and discharge  
8 such claims is therefore inappropriate.

9 **SUPPLEMENTAL BRIEF**

10 **I. The Debtors Seek To Use Assumption of Executory Contracts In An Unprecedented  
11 Manner.**

12 6. Within the Debtors' 2,000+ page Plan Supplement<sup>4</sup> is the following paragraph:

13 **Other Indemnification Obligations.** Except as set forth in Section  
14 8.4 of the Plan with respect to the D&O Indemnity Obligations, **the  
15 assumption** by the Debtors or Reorganized Debtors, as applicable,  
16 of all other executory contracts or unexpired leases pursuant to the  
17 Plan **shall result in the full release and satisfaction of any and all  
18 contingent pre-petition indemnification obligations arising under  
the terms of any such agreements** and any proof of Claim premised  
on a pre-petition contractual indemnification obligation alleged to  
be owed by the Debtors or Reorganized Debtors **shall be deemed  
disallowed and discharged** on the Effective Date, without further  
notice to or action, order, or approval of the Bankruptcy Court.

19 Plan Supplement, Exhibit B ¶ 13 (emphasis added).

20 7. To be clear about what this paragraph is intended to do: the Debtors attempt to  
21 have **assumption** of executory contracts operate to discharge otherwise valid and enforceable  
22

23  
24 <sup>2</sup> *See Debtors' and Shareholder Proponents' Joint Chapter 11 Plan of Reorganization Dated May 22, 2020* [Docket  
25 No. 7521] (as it may be amended, modified or supplemented from time to time, and together with any exhibits or  
schedules thereto, the "Plan"). Capitalized terms not defined herein have the meanings ascribed to them in the  
Plan.

26 <sup>3</sup> The term "Vendors" refers to the "vendors, suppliers, third party contractors and consultants (including those who  
27 provided services regarding the Debtors' electrical system, system equipment, inspection and maintenance of the  
system, and vegetation management)" referred to in Section 1.8 of the Plan.

28 <sup>4</sup> *Notice of Filing of Plan Supplement in Connection with Debtors' and Shareholder Proponents' Joint Chapter 11  
Plan of Reorganization Dated March 16, 2020* [Docket No. 7037] (the "Plan Supplement").

1 prepetition claims. The Debtors' Reply confirms as much, claiming section 502(e) as its sole  
2 authority:

3 . . . [I]n determining the cure that may be owed to a counterparty on  
4 assumption of their executory contract, the Debtors may rely on  
5 section 502(e) to assert that prepetition claims based on contingent  
indemnity or contribution rights ***are not properly part of the  
assumed obligations*** or cure requirement.

6 Debtors' Reply at 55 (emphasis added). This provision borders on an attempt to evade the Debtors'  
7 black-letter law obligation to assume contracts "*cum onere*."<sup>5</sup> The Debtors assert that these  
8 indemnification obligations—arising within an assumed executory contract—are “not properly  
9 part” of the assumed contract (*id.*) because those obligations are disallowed *ipso jure* under section  
10 502(e)(1)(B) upon occurrence of the Effective Date, without appropriate notice or due process  
11 protection for the supposedly unimpaired creditor. *See id.* at 52-53 (“Even if a claimant has filed  
12 a proof of claim asserting a contingent claim for indemnification or contribution, Bankruptcy Code  
13 section 502(e)(1)(B) specifically disallows any such claim . . .”). The Debtors cite no authority  
14 for the invalidation of claims under section 502(e)(1)(B) through assumption of contracts under  
15 section 365, because none exists.

16 8. Indeed, when Congress wanted section 365 of the Bankruptcy Code to  
17 automatically invalidate contract provisions, it expressly said so. *See, e.g.*, 11 U.S.C. § 365(e)(1)  
18 (rendering *ipso facto* clauses unenforceable); § 365(f) (making anti-assignment provisions  
19 unenforceable). There is no similar provision in section 365 with respect to contingent claims for  
20 indemnification; therefore, such claims are not automatically disallowed upon assumption.

21

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22 <sup>5</sup> *See, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984); *Elliott v. Four Seasons Props. (In re Frontier  
23 Props., Inc.)*, 979 F.2d 1358, 1367 (9th Cir. 1992) (“[T]he cost of assumption is nothing short of complete  
mutuality and requires performance in full just as if bankruptcy had not intervened.”) (internal quotation omitted).

24 Indeed, the principle of assumption *cum onere* is so fundamental that courts have found indemnification  
25 obligations in assumed executory contracts to survive ***even where a creditor fails to file a proof of claim***. *See In  
26 re G-I Holdings, Inc.*, 580 B.R. 388, 397, 399 (Bankr. D.N.J. 2018) and *Ashland Inc. v. G-I Holdings Inc.*, No. L-  
27 2331-15 (N.J. Super. Ct. App. May 30, 2018). In this pair of related cases, a debtor had assumed an indemnity  
28 agreement, and the counterparty—who had failed to file a proof of claim—sought to enforce it years after the  
bankruptcy case was over. Despite the debtor’s arguments that the indemnification claim had been discharged  
because the creditor failed to timely file a proof of claim, the New Jersey state court ultimately determined that,  
as the debtor had assumed the contract, the “debtor [was] subject to the benefits and burdens of the contract,” and  
such “benefits and burdens” included those that are “based on post-assumption obligations.” *Ashland Inc.*, No. L-  
2331-15, at \*11-12, \*15.

1           9. The Debtors' attempt to use assumption in this unprecedented fashion constitutes  
2 impairment under the Plan. In the absence of the above-quoted Plan Supplement provision, the  
3 Debtors' indemnification obligations under assumed executory contracts would survive and  
4 remain enforceable. Their disallowance and discharge is plainly not an automatic result of  
5 assumption nor a result required by the Bankruptcy Code (as the Debtors intimate)—for the  
6 Debtors elsewhere provide that identical claims in the hands of more favored parties are preserved.

7           10. Indeed, at the same time that the Debtors explain that it is not the Plan that impairs  
8 *Vendors'* contingent indemnification and contribution claims—because the Plan “merely  
9 acknowledges what has already been done by operation of the Bankruptcy Code” (Debtors' Reply  
10 at 53)—the Debtors expressly preserve those same obligations for their *own Directors, Officers,*  
11 *and employees.* *See* Plan § 8.4.

12           11. Section 8.4 of the Plan expressly provides for the assumption of the indemnification  
13 obligations owed to the Debtors’ “current and former officers, directors, agents, or employees”  
14 under the executory contracts the Debtors are assuming, “with respect to all present and future  
15 actions, suits, and proceedings against the Debtors or such officers, directors, agents or employees  
16 . . . .” Plan § 8.4. The Debtors go even further, stating that “[a]ny Claim based on the Debtors’  
17 Obligations in this Section 8.4 herein shall not be a Disputed Claim or *subject to any objection, in*  
18 *either case, by reason of section 502(e)(1)(B) of the Bankruptcy Code* or otherwise.” *Id.*  
19 (emphasis added). This selective preservation of one set of contingent claims for indemnification  
20 contradicts the Debtors’ contention that all such claims are subject to disallowance and discharge  
21 *by operation of law.* *See, e.g.*, Debtors' Reply at 52 (noting, without exception, that “[e]ven if a  
22 claimant has filed a proof of claim asserting a contingent claim for indemnification or contribution,  
23 Bankruptcy Code section 502(e)(1)(B) specifically disallows *any such claim* for which the  
24 Debtors are conceivably co-liable with the claimant” (emphasis added)). If the Debtors were right,  
25 the indemnification obligations to the Debtors’ directors, officers, and other agents would vanish  
26 as well. But the Debtors are *choosing through their Plan* not to make that so.

27           12. The most the Debtors could have done was to ask the Court to view the Plan as an  
28 objection to contingent indemnification claims under section 502(e) of the Bankruptcy Code,

1 providing the requisite evidentiary showing for such relief and allowing applicable claimants to  
2 interpose defenses.<sup>6</sup> But the Debtors have not done so. Contingent claims for indemnification  
3 may only be disallowed if the Court affirmatively disallows them upon an appropriate evidentiary  
4 record.<sup>7</sup> Until that time, the Debtors' attempt at summary, *per se* disallowance and discharge of  
5 such claims is impairment, effected by the Plan.

6 **II. To the Extent the Debtors Seek Disallowance Under § 502(e), It Should Be Denied.**

7 13. If the Court is inclined to overlook the procedural infirmity of the Debtors' actions  
8 and to view the Plan as an objection to contingent indemnification claims against the Debtors under  
9 section 502(e)(1)(B) of the Bankruptcy Code, such objection should be denied. The concerns  
10 animating section 502(e)(1)(B)—the risk of duplicative claims being made on the limited  
11 resources of an insolvent estate—are not implicated here. For one, there is no risk of “double-  
12 dipping”; for another, the Debtors are solvent.

13 14. The legislative history of section 502(e)(1)(B) demonstrates that this section is  
14 intended to guard against duplicative claims being made against a debtor as it:

15 requires disallowance of the claim for reimbursement or  
16 contribution of a codebtor, surety or guarantor of an obligation of  
17 the debtor, unless the claim of the creditor on such obligation has  
been paid in full. The provision prevents competition between a  
creditor and his guarantor for the limited proceeds in the estate.

18 H.R. Rep. No. 95-595, 95th Cong., at 354 (1977). *See also* S. Rep. No. 95-989, 95th Cong., at 65  
19 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5851. Case law confirms this  
20 intent. *See In re Hexcel Corp.*, 174 B.R. at 811 (section 502(e)(1)(B) was intended to prevent  
21 “duplicative claims” against the bankrupt’s estate, namely, “to prevent a guarantor from filing a  
22 contingent claim for indemnification (before honoring its guaranty) which would compete with  
23 the noncontingent claim of the party to whom the debtor was primarily liable”) (internal citations

24  
25 <sup>6</sup> The TCC’s reply cites cases in which prepetition claims that were within the “fair contemplation” of the claimant  
but not timely filed in a proof of claim are subject to discharge under section 1142 of the Bankruptcy Code. *See*  
*Reply Brief of the Official Committee of Tort Claimants to Certain Objections to Confirmation of Debtors’ and*  
*Shareholder Proponents’ Joint Chapter 11 Plan of Reorganization Dated March 16, 2020* [Docket No. 7509] at  
3-4. The Creditors’ Committee agrees with this unremarkable proposition and does not understand its relevance  
here.

26  
27 <sup>7</sup> Indeed, this applies in equal measure to all creditors who have filed proofs of claim reserving indemnification  
rights (in addition to Vendors whose contracts are being assumed).

1 omitted); *In re Eagle-Picher Indus.*, 131 F.3d 1185, 1187 (6th Cir. 1997) (section 502(e)(1)(B) “is  
2 not intended to immunize debtors from contingent liability, but instead protects debtors from  
3 multiple liability on contingent debts”) (internal citations omitted).

4 15. Double recovery is not a legitimate concern here. The settlement with the TCC  
5 does not alter the indemnification rights that Vendors may have against the Debtors, and vice versa.  
6 Even though the Debtors reached a settlement with the Fire Victims regarding the Debtors’ *own*  
7 share of liability to those victims, this settlement does not change the fact that the Debtors have  
8 obligations to indemnify some Vendors for portions of tort victims’ damages *attributable to those*  
9 *Vendors* in connection with work performed for the Debtors. In other words, the settlement  
10 between the Debtors and the TCC should not operate to extinguish standalone indemnification  
11 rights of the Vendors. The share of liability owed directly by the Debtors to the Fire Victims does  
12 not constitute *the same liability* as the share of liability for which the Vendors may be found  
13 responsible, and for which the Debtors agreed to indemnify such Vendors. The Vendors’  
14 indemnification claims against the Debtors are therefore not “competing” with the Fire Victims’  
15 claims against the Debtors for estate assets.

16 16. In addition, section 502(e)(1)(B) was designed to protect *insolvent* estates. “The  
17 sole purpose served by section 502(e)(1)(B) is to preclude redundant recoveries on identical claims  
18 *against insolvent estates* in violation of the fundamental Code policy fostering equitable  
19 distribution among all creditors of the same class.” *Juniper Dev. Grp. v. Kahn (In re Hemingway*  
20 *Transport, Inc.)*, 993 F.2d 915, 923 (1st Cir. 1993) (emphasis added), *cert. denied*, 510 U.S. 914  
21 (1993); *see also Potter v. CNA Ins. Co. (In re MEI Diversified, Inc.)*, 106 F.3d 829, 831 (8th Cir.  
22 1997) (quoting same).

23 17. Here, where the Debtors’ estates are solvent, the concerns animating section  
24 502(e)—to the extent present at all—are of significantly less relevance. The statutory goal of  
25 preventing competition over limited assets of an insolvent estate and ensuring equitable  
26 distribution among all creditors also is not served by disallowance of indemnification claims of  
27 the Vendors under section 502(e)(1)(B).

1                   **III. While Relying on Section 502(e)(1)(B), the Debtors Ignore the Operation of Section**  
2                   **502(e)(2).**

3                   18. Finally, while purporting to rely on section 502(e) to effectuate a blanket  
4                   disallowance and discharge of contingent claims for indemnification, the Debtors ignore the  
5                   operation of section 502(e)(2), which provides that such contingent claims may become fixed and  
6                   allowable at a later date.

7                   19. Section 502(e)(2) states:

8                   A claim for reimbursement or contribution of such an entity that  
9                   becomes fixed after the commencement of the case shall be  
10                   determined, and shall be allowed under subsection (a), (b), or (c) of  
11                   this section . . . the same as if such claim had become fixed before  
12                   the date of the filing of the petition.

13                   11 U.S.C. § 502(e)(2). Under this section, claims that may be disallowable under section  
14                   502(e)(1)(B) may become fixed at a later date and be allowed at such time. *See In re Pettibone*  
15                   *Corp.*, 110 B.R. 837, 846-47 (Bankr. N.D. Ill. 1990) (stating sections 502(e)(1)(B) and 502(e)(2)  
16                   “serve . . . to **defer** allowing claims for reimbursement **until they are no longer contingent**,” and  
17                   “[o]nce such a claim is no longer contingent, § 502(e)(2) permits it to be allowed as a pre-petition  
18                   claim”) (emphasis added); *see also* 4 Collier on Bankruptcy P. 502.06 (16th ed. 2020) (“[T]o the  
19                   extent that the codebtor, surety or guarantor has made payment to the underlying creditor after the  
20                   petition date, the codebtor’s, surety’s or guarantor’s claim will be allowed or disallowed under  
21                   section 502 as though it had become fixed before the filing of the petition for relief.”).

22                   20. Courts have permitted claims that were disallowable under section 502(e)(2) to  
23                   become allowed once they are no longer contingent. For example, in *In re Archdiocese of Saint*  
24                   *Paul and Minneapolis*, 579 B.R. 188, 197 (Bankr. D. Minn. 2017), the court noted that when  
25                   creditors “eventually make payments” based on inevitable future tort lawsuits, the creditors’ claims  
26                   will mature and will at that time become allowed under section 502(e)(2). The court concluded  
27                   that because the proposed plan “fail[ed] to provide for th[o]se claims,” ***the plan could not be***  
28                   ***confirmed.*** *Id.* The court in *In re Pettibone Corp.* similarly observed that contingent claims were  
disallowed under section 502(e)(1)(B) only “until such time, ***if ever***, that the co-defendants are all  
found liable and judgment is recovered from the non-debtor defendants. At that time, pursuant to

1       § 502(e)(2), the reimbursement claim is deemed effective as of a pre-petition date.” 110 B.R. at  
2 846-47 (emphasis added).

3       21. Even in *In re Dant & Russell, Inc.*, 951 F.2d 246 (9th Cir. 1991), a case cited by  
4 the Debtors,<sup>8</sup> the Court left open the possibility that a reserve could be established to account for  
5 contingent claims that may become fixed post-confirmation:

6           With regard to the cost of future cleanup, CERCLA authorizes  
7 award of these funds to BN after they are incurred. ***This holding***  
8 ***does not interfere with the powers of the bankruptcy court as a***  
9 ***court of equity to establish a trust fund if the estate has assets, or***  
10 ***to make provision for other forms of relief*** ‘necessary or  
11 appropriate to carry out the provisions of the bankruptcy code.’

12       *Id.* at 250 (quoting 11 U.S.C. § 105(a)) (emphasis added).

13       22. If the Court determines to temporarily disallow the Vendors’ contingent claims for  
14 indemnification across-the-board, as the Debtors seem to request, the Creditors’ Committee  
15 respectfully requests the Court to consider creating a reserve to account for such claims that may  
16 mature post-confirmation. *See id.* at 250; *In re Archdiocese of Saint Paul and Minneapolis*, 579  
17 B.R. at 197.

18       DATED: June 1, 2020

19           MILBANK LLP

20           \_\_\_\_\_  
21           /s/ *Gregory A. Bray*

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28       \_\_\_\_\_  
8       *See* Debtors’ Reply at 53.